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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Justice

Index Number : 602508/2005

MARA & CO.

VS

CASHDAN, ELLIOT

Sequence Number : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

otion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is consolidated for determination with motion sequence no. 003 and the consolidated motions are determined in accordance with the annexed decision and order.

FILED

MAY 22 2007

COUNTY CLERK'S OFFICE NEW YORK

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

Dated: May 15, 2007

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

MARA & CO., INC.,

Plaintiff,

- against -

ELLIOT CASHDAN,

Defendant.

----------X

INDEX NO.: 602508/2005

JOAN A. MADDEN, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

This is an action to recover a real estate brokerage commission in connection with the sale of defendant Elliot Cashdan's condominium apartment, Unit 24-C, located in the building known as the Channel Club at 455 East 86th Street in Manhattan. In motion sequence number 002, defendant Cashdan moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint in its entirety, and for the imposition of sanctions for frivolous conduct pursuant to 22 NYCRR §130.1. In motion sequence number 003, plaintiff Mara & Co., Inc. moves for an order pursuant 3212 granting summary judgment on its First Cause of Action for breach of a written contract.

The following facts are not disputed unless otherwise noted. On January 18, 2005, plaintiff Mara & Co., a licensed real estate agency, and defendant Cashdan entered into an exclusive residential brokerage agreement for the sale of Cashdan's apartment. The agreement conditioned that the apartment would only be sold only in conjunction with the adjoining apartment, Unit 24-D, owned by Allen Schulman, and provided that Cashdan's apartment would be offered for sale at a price of $1,100,000. The agreement contained an exclusivity provision

for a 90-day term that would expire on April 18, 2005, and stated that "[a]t the end of the exclusive period, the listing will automatically convert to an open, non-exclusive listing, unless you [Cashdan] advise us [Mara & Co.] to the contrary." The agreement provided for Cashdan to pay Mara & Co. a commission in the amount of 4.5% of the total sale price, if the apartment was sold during the 90-day exclusivity period, regardless of whether Mara & Co. procured the sale. Specifically, the agreement stated that "[d]uring the term of this agreement, you agree to refer to us all inquiries, proposals and offers received by you from other brokers, and you agree to conduct all negotiations with respect to the sale or other disposition of the property solely and exclusively through us." The agreement also provided that Mara & Co. would be entitled to a commission if, within six months after the expiration of the agreement, a contract was signed to sell the apartment to a purchaser on a list prepared by Mara & Co. of all prospective purchasers who inspected the apartment during the exclusive period. The agreement further stated that it "may not be changed, rescinded or modified except in writing, signed by both of us."

According to Jack Mara, President of Mara & Co., he advised Cashdan that he did not see anyone paying the asking price for two apartments not already joined, since a certain amount of work and expense would still be required to combine them. The parties went forward with the agreement and Mara & Co. advertised and held a number of open houses by appointment. On March 30, 2005, when nineteen days remained on the exclusivity period, Cashdan and Schulman decided to sell their apartments individually.[1] Cashdan informed Victoria Mirabelli, a licensed real estate agent employed by Mara & Co., of his decision to sell individually. The parties did

[1] Although the date is unclear, it appears from the record that Mara & Co. sold the Schulman apartment for $435,000.

not execute any written document memorializing this modification to the brokerage agreement.

The parties disagree as to the subsequent events. According to Mara & Co., on April 13, 2005, Cashdan orally agreed to extend and enter into a new exclusive brokerage agreement, and pursuant to that oral agreement, Mirabelli continued to show the apartment as an exclusive agent after the original agreement expired. Mara & Co. also alleges that on or about April 20, 2005, two days after the expiration of the original agreement, Mirabelli told Cashdan that she would bring the new agreement for him to sign, Cashdan said "okay," and she left of copy of the new agreement on Cashdan's kitchen counter. Mara & Co. submits a copy of an "Exclusive Right to Sell Agreement," which is neither dated nor signed, and is not on company letterhead; the agreement gave Mara & Co. an exclusive right to sell Cashdan's apartment for 60 days with a 4.5% commission, and to offer the apartment for sale at a price of $899,000.

Cashdan, on the other hand, denies that he was ever presented with a new agreement, and that he even discussed extending or orally agreeing to extend Mara & Co.'s exclusive right to sell. According to Cashdan, one or two weeks prior to the expiration of the original brokerage agreement, he asked Mirabelli what would happen after it expired, and she responded that the agreement "turns into anything you want it to turn into." Meanwhile, on April 26, 2005, Sheila Nevins and her husband, Sidney Koch, saw Cashdan's apartment and offered $825,000, which Cashdan immediately accepted. It is not disputed that Cashdan and Nevins entered into a contract of sale for $825,000, which is dated April 26, 2005; the closing occurred on June 23, 2005.

On or about July 2005, Mara & Co. commenced the instant action to recover a real estate brokerage commission on the sale of Cashdan's apartment. The complaint asserts five causes of

action for breach of a written contract, breach of an oral agreement, quasi contract, unjust enrichment and quantum meruit. Mara & Co. is now moving for summary judgment on its first cause of action for breach of the written agreement, and Cashdan is moving for summary judgment dismissing the complaint in its entirety and for an order of sanctions pursuant to 22 NYCRR §130.1.

To obtain summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidentiary proof to demonstrate the absence of any material issues of fact. See Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). Once the movant satisfies this burden, the party opposing the motion must come forward with sufficient evidence to establish the existence of a material issue of fact for trial. See id.

Generally, a real estate broker seeking a brokerage commission, must establish the following elements: (1) it is duly licensed; (2) it had a contract, either express or implied, with the party to be charged with paying the commission; and (3) it was the procuring cause of the sale. See Stanzoni Realty Corp. v. Landmark Properties of Suffolk, Ltd., 19 AD3d 582 (2nd Dept 2005); Steven Fine Assocs., Inc. v. Serota, 273 AD2d 375 (2nd Dept 2000). Where a broker has an exclusive right to sell agreement, it is entitled to a commission for any sale procured within the time frame specified in the agreement, regardless of who was responsible for bringing about the sale. See Rachmani Corp. v. 9 East 96th Street Apartment Corp, 211 AD2d 262, 268 (1st Dept 1995); Audrey Balog Realty Corp., Inc. v. East Coast Real Estate Developers, Inc., 202 AD2d 529 (2nd Dept 1994). "A contract will not be construed to create an exclusive right to sell unless it expressly and unambiguously provides for a commission upon sale by the owner or excludes the owner from independently negotiating a sale." Far Realty Assocs. Inc. v. RKO Delaware

Corp., 34 AD3d 261, 262 (1st Dept 2006); see also CV Holdings, LLC v. Artisan Advisors, LLC, 9 AD3d 654 (3rd Dept 2004); Harvard Assocs., Ltd. v Hayt, Hayt & Landau, 264 AD2d 814 (2nd Dept 1999).

Applying this standard, the Court finds that Mara & Co. has failed to make a prima facie showing that it is entitled to judgment as a matter of law on its First Cause of Action for breach of the written brokerage agreement. It is not disputed that Mara & Co. is a licensed real estate broker and that it had an express agreement for the exclusive right to sell Cashdan's apartment through April 18, 2005. It is also undisputed that Cashdan's apartment was sold to Sheila Nevins eight days after that exclusive agreement expired. Moreover, Mara admits that he had no knowledge of Nevins and Koch, never spoke to them about the sale of the apartment, and did not "bring them together in any way." Rather, Mara & Co. contends that it is entitled to a commission on the sale, as Nevins and her husband, Sidney Koch, were introduced to and engaged in negotiations with Cashdan during the term of the exclusivity agreement. Mara & Co. further contends that Cashdan, Nevins and Koch "engaged in a scheme to avoid Defendant's obligation to pay broker's fees which in turn enabled Defendant to lower the purchase price to the amount that the purchasers (Nevins and Koch) were willing to pay." To support these contentions Mara & Co. relies on the party and non-party deposition testimony of its President, Jack Mara, defendant Cashdan, and non-parties Sheila Nevins and her husband, Sidney Koch. However, a careful review of such testimony does not support this conclusion, as Cashdan, Nevins and Koch consistently testified that the only conversations and negotiations they had with Cashdan about their purchasing the apartment, occurred after the exclusivity period terminated.

Specifically, at his deposition, Cashdan explained that Nevins and Koch also resided in the Channel Club and that they previously knew each other as members of the condominium's board of directors. Cashdan testified that he never had any conversation with Nevins about his apartment being for sale. As to Koch, Cashdan explained that in the beginning of January 2005, he spoke to Koch, as a member and president of the board with more than ten years of experience, about the feasibility in the building of selling his and the Schulman apartments together. Cashdan explained that from January 18 to April 18, 2005, the term of the exclusivity agreement, he and Koch, as board members, spoke often about "building business," and while he told Koch about "difficulties" with the sale, they had no conversations about selling the apartment individually to Koch. Cashdan testified that after he decided to sell the apartment individually, he spoke once to Koch either during the week of April 21, 2005 or a week before the April 26th offer, because he knew Koch owned other apartments in the building as an investment. Cashdan explained that on the morning of April 26, 2005, Koch and Nevins came to see the apartment and later that day Koch informed Cashdan that Nevins wanted to buy the apartment and offered $825,000, which Cashdan immediately accepted.

Koch testified that he knew Cashdan's apartment was for sale in early January 2005, since Cashdan asked him for advice, as a board member, about selling the two apartments together. Koch testified that at the time he did not discuss buying the apartments, because he was not interested and the price was "too high." Koch explained that Cashdan did not approach him about buying the apartment, but "at one point" as board members, "it came up in conversation" when Cashdan told him Schulman's apartment was sold; at that time Cashdan also mentioned "something" about an exclusive agreement. Koch explained that he knew then that Cashdan's

apartment was for sale individually but still thought the price was "high" and he wanted "to think about it." Koch testified that the only time Cashdan spoke to him about buying the apartment was "just before we signed the contract" or a "few days before we signed the contract," but he could not remember the precise day.

At her deposition, Nevins explained that in addition to the apartment she and Koch reside in, they own five apartments in the building for investment purposes. She testified that through the "buzz" in the building and the elevator, she heard that two apartments on the 24th floor were for sale jointly, and she and Koch discussed the possibility of buying them as a potential investment; he told her the apartments were not joined, and they thought the sellers were "asking a lot of money." Nevins testified that a week or two before purchasing Cashdan's apartment, she heard the "buzz" that it was for sale individually, and she and Koch talked about buying it, and less than a week later, they entered into the contract of sale. She also testified that she never discussed the sale with Cashdan, and that she saw the apartment for the first time alone a day or two before she and Koch saw it together on April 26th. She explained that by the time she saw the apartment they had already decided to buy it, "because I just knew it by heart."

The foregoing testimony demonstrates that Cashdan independently secured Nevins as the purchaser after the 90-day term of the exclusive agreement expired. It is clear that Nevins and Koch were not "introduced" to Cashdan while the brokerage agreement was in effect, as they were already well acquainted with each other as residents of the same building and as members of the building's board of directors. Koch, Nevins and Cashdan consistently testified that all their conversations and negotiations regarding the sale of the apartment to Nevins and Koch, took place a few days before the offer was made and accepted on April 26, 2005, which was after the

expiration of the exclusive period on April 18, 2005. Prior to that time, any discussions that Cashdan and Koch had about sale, did not occur in the context of a seller and buyer relationship, but as two board members, with Cashdan initially seeking advice about the feasibility of a joint sale and combining the two apartments, and later mentioning that he was having "difficulty" selling the apartment and that Schulman had sold his apartment. Koch had no interest in buying the two apartments jointly as the price was "too high," and even after he found out that Cashdan's apartment was for sale individually, he said he still had to "think about it." A week or two before the sale, Nevins heard that Cashdan's apartment was for sale individually, and at that time she and Koch discussed the possibility of buying it as an investment; less than a week later, they entered into the contract of sale. Nevins, however, never had any discussions with Cashdan about buying the apartment, and the only time Koch and Cashdan discussed the sale, was less than a week before the contract was signed, which would have been after the expiration of the brokerage agreement.

While Mara & Co. further asserts that Cashdan and Koch "engaged in a scheme" to avoid paying a brokerage commission, it submits no admissible evidence showing or even suggesting the existence of such a scheme. See Stephen Hirshon, Ltd. v. Coffey, 260 AD2d 465 (2nd Dept 1999). Although circumstances such as those here, where the sale is consummated immediately after the expiration of the brokerage agreement, may cast some doubt about the parties' intentions, that fact alone is insufficient to raise an issue as to fraud or bad faith.

Thus, absent a sufficient evidentiary showing that Cashdan engaged in negotiations with Koch and Nevins during the term of the brokerage agreement, or engaged in conduct designed to avoid payment of a commission, Mara & Co. is not entitled to summary judgment on its First

Cause of Action for breach the written brokerage agreement. See id. Cashdan, on the other hand, is entitled to summary judgment dismissing that claim, as the sworn deposition testimony establishes the absence of any material issues of fact as to whether he breached the written brokerage agreement.

The court now turns to the balance of Cashdan's motion for summary judgment which seeks dismissal of Mara & Co.'s remaining causes of action for breach of an oral agreement, quasi contract, unjust enrichment and quantum meruit.

With respect to the Second Cause of Action for breach of an oral agreement, Mara & Co. alleges that it had an oral agreement with Cashdan providing for an additional 60-day exclusivity period, which was memorialized in writing. In moving for summary judgment, Cashdan argues that the alleged oral agreement is unenforceable in view of the language in the original agreement stating that it "may not be changed, rescinded or modified except in writing, signed by both of us."

Where a written agreement, such as the instant brokerage agreement, provides that it can only be changed by a signed writing, an oral modification is nevertheless enforceable if the party seeking enforcement can demonstrate partial performance of the oral modification which is "unequivocally referable" to the oral modification See Rose v. Space Realty Assocs, 42 NY2d 338, 343 (1977). "Unequivocally referable" means that the partial performance is inconsistent with any other plausible explanation. See Richardson & Lucas, Inc. v. New York Athletic Club, 304 AD2d 462, 463 (1st Dept 2003).

Here, nothing Mara & Co. did after the original agreement expired can be construed as "unequivocally referable" to a subsequent oral agreement extending the exclusivity period. To

the contrary, Mara & Co.'s conduct in continuing to list and show the apartment to prospective purchasers is entirely consistent with the express terms of the original agreement which provided that at "the end of the exclusive period, the listing will automatically convert to an open, non-exclusive listing." The fact that Mara & Co. may have drafted a new agreement providing for an additional 60-day exclusive period, is not dispositive, as it is undisputed that Cashdan never signed that document, and he denies the existence of a new agreement. See Garrick-Aug Assocs Store Leasing, Inc. v. Shefa Land Corp., 270 AD2d 68 (1st Dept 2000). Thus, as the alleged oral agreement is unenforceable, Cashdan is entitled to summary judgment dismissing the Second Cause of Action for breach of the oral agreement.

Cashdan is likewise entitled to summary judgment dismissing the causes of action for quasi-contract, unjust enrichment and quantum meruit, since the parties' relationship was defined by the written brokerage agreement, and it is undisputed that Mara & Co. was not the procuring cause of the sale. See Clark-Fitzpatrick, Inc. v. Long Island Railroad Co., 70 NY2d 382 (1987); HGCD Retail Services, LLC v. 44-45 Broadway Realty Co., 37 AD3d 43 (1st Dept 2006); Orenstein v Brum, 27 AD3d 352 (1st Dept 2006); Rosenberg v. Helmsley Enterprises, Inc., 273 AD2d 101, 102 (1st Dept 2000); Garrick-Aug Assocs Store Leasing, Inc. v. Shefa Land Corp., supra at 69; Edward S. Gordon Co., Inc. v. Pennisula New York Partnership, 245 AD2d 189, 190 (1st Dept 1997).

Finally, that portion of Cashdan's motion for an order imposing sanctions pursuant to 22 NYCRR §130.1, is denied. Under the circumstances presented herein, it cannot be said that the filing of the complaint warrants the imposition of sanctions for frivolous conduct.

Accordingly, it is

ORDERED that defendant Elliot Cashdan's motion for summary judgment dismissing the complaint in its entirety is granted (motion sequence no. 002), and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of defendant Elliot Cashdan's motion for the imposition of sanctions is denied; and it is further

ORDERED that plaintiff Mara & Co., Inc.'s motion for summary judgment (motion sequence no. 003) is denied.

DATED: ~~April~~ May 15, 2007

ENTER:

J.S.C.

FILED
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